United States Courts
Southern District of Texas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES AND ERISA LITIGATIONS	§ Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§ CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§
PAMELA M. TITTLE, et al., Plaintiffs, vs. ENRON CORP., an Oregon corporation, et al., Defendants.	§

MEMORANDUM IN SUPPORT OF REPRESENTATIVE PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED PARTIAL SETTLEMENT

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I. INTRODUCTION

Representative Plaintiffs,[1] in the actions entitled *Newby, et al. v. Enron Corp., et al.*, No. H-01-CV-3624 (S.D. Tex.); *The Regents of the University of California, et al. v. Kenneth L. Lay, et al.*, No. H-01-3624 (S.D. Tex.); *Washington State Investment Board, et al. v. Kenneth L. Lay, et al.*, No. H-02-CV-3401 (S.D. Tex); and *Tittle, et al. v. Enron Corp., et al.*, No. H-01-CV-3913 (S.D. Tex.), consolidated in *In re Enron Corporation Securities and ERISA Litigations*, Civil Action No. H-01-3624, by their undersigned counsel, respectfully submit this memorandum in support of their motion for an order (the "Order"), in the form attached as Exhibit A to the Stipulation of Partial Settlement dated as of August 29, 2002 (the "Stipulation"): (i) granting preliminary approval of the proposed partial settlement of the Actions with Andersen Worldwide Societe Cooperative ("AWSC"), Arthur Andersen (United Kingdom), Arthur Andersen-Brazil, and Anderson Co. (India) (the "Defendant Member Firms") on the terms set forth in the Stipulation; (ii) certifying a Settlement Class; (iii) approving the form and manner of giving notice to the Settlement Class of the settlement; and (iv) setting a hearing for final approval thereof.

The Actions have been settled with respect to AWSC and the Defendant Member Firms for $40 million. In addition, as discussed in more detail below, AWSC and certain of its Member Firms have agreed voluntarily to produce documents relating to the Actions and to use their best efforts to identify and make available witnesses for interviews by Representative Plaintiffs' counsel. The settlement does ***not*** release Arthur Andersen LLP and the Actions will continue against Arthur Andersen LLP and the other defendants named in the complaints filed in the Actions.

Representative Plaintiffs request that the motion be granted not only because public policy favors the settlement of complex class actions such as these, but, as demonstrated herein, the settlement has achieved a very good result for the Settlement Class under the difficult circumstances present here with respect to AWSC and the Defendant Member Firms. It is fair, reasonable and adequate under the governing standards in this Circuit and deserves the approval of this Court.

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[1] Capitalized terms used herein and not otherwise defined in this Memorandum have the same meaning as set forth in the Stipulation.

In determining whether preliminary approval is warranted, the issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable and adequate, such that notice of the proposed settlement should be given to Settlement Class members, and a hearing scheduled to consider final settlement approval. The Court is not required at this point to make a determination as to whether the settlement should be finally approved.[2] As stated in the *Manual for Complex Litigation (Third)* §23.14, at 171 (3d ed. 1995):

> First, the court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.

The *Manual for Complex Litigation (Third)* describes the preliminary approval criteria as follows:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Id. §30.41, at 237. The proposed settlement unquestionably meets the foregoing criteria for notice and is well within the range of what might be approved as fair, reasonable and adequate. Representative Plaintiffs, therefore, request that the Court enter an order:

(1) preliminarily approving the proposed settlement;

(2) certifying a class for settlement purposes;

(3) approving the form and program of class notice described in the Stipulation; and

(4) scheduling a hearing before the Court to determine whether the proposed settlement should be finally approved.

II. FACTUAL BACKGROUND OF THIS LITIGATION

This Court has already demonstrated its familiarity with Representative Plaintiffs' allegations regarding the facts and circumstances surrounding the collapse of Enron. *See, e.g., In re Enron*

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[2] Notwithstanding the fact that this is only a motion for preliminary approval, the brief discussion below of the factors to be considered in connection with final approval demonstrates that this settlement is entitled to both.

Corp. Securities, Derivative and ERISA Litigations, 235 F. Supp. 2d 549 (S.D. Tex. 2002). For the sake of brevity, those allegations will not be repeated here.

This partial settlement resolves the Actions with respect to AWSC and the Defendant Member Firms.[3] It does not resolve claims asserted against Arthur Andersen LLP or the other defendants named in the complaints in the Actions. AWSC is a Cooperative formed under the Swiss Code of Obligations and domiciled at Meyrin, Geneva, Switzerland. Such Cooperative is a limited liability entity under Swiss law. AWSC served as the coordinating entity of the Andersen network, which had Member Firms in countries throughout the world. Each Member Firm was formed under the laws of the country in which it was located. The relationship between each Member Firm and AWSC was a contractual one, governed by a separate Member Firm Interfirm Agreement between each Member Firm and AWSC. AWSC does not provide professional services to any client and does not earn a profit. The Defendant Member Firms are Andersen Co. (India), Arthur Andersen-Brazil, and Arthur Andersen (United Kingdom). The complaints in the Actions allege that the Defendant Member Firms all participated, to one degree or another, in audits of Enron for the years 1997-2000 or rendered other services to Enron subsidiaries or related entities. Representative Plaintiffs contend that AWSC and the Defendant Member Firms participated in the scheme alleged.

AWSC and the Defendant Member Firms vigorously contested jurisdiction in each of their motions to dismiss. On the merits of the claims asserted against them, AWSC argued that the complaints did not allege that it performed any services at all for Enron. The Defendant Member Firms each asserted that the complaints did not allege that the services performed by them were deficient in any way, and did not allege wrongful conduct or knowing participation in the Enron scheme.

In addition, because of the impact on AWSC and its Member Firms occasioned by the civil allegations against, and the criminal indictment and subsequent conviction of, Arthur Andersen LLP, AWSC is in the process of winding up its affairs (which may culminate in a Swiss bankruptcy

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[3] Although the settlement is with AWSC and the Defendant Member Firms, the release agreed to by the Representative Plaintiffs includes any AWSC Entity and encompasses, *inter alia*, all current and former firms worldwide that have entered into a "Member Firm Interfirm Agreement" with AWSC, with the exception of Arthur Andersen LLP.

proceeding) and most of the former Member Firms have meanwhile entered into arrangements with other accounting firms if they are not on the brink of bankruptcy or have already been dissolved. Thus, even if AWSC's and the Defendant Member Firms' jurisdictional arguments were rejected by the Court and liability established, the collectibility of any resulting judgment would be in serious doubt.

These three issues – jurisdiction, liability and collectibility – presented daunting obstacles to any recovery. Nonetheless Representative Plaintiffs' counsel were able to negotiate a multi-million dollar recovery for the Settlement Class as well as substantial cooperation in prosecuting the claims asserted against the remaining defendants.

III. THE SETTLEMENT

The settlement provides for the establishment of a settlement fund in the amount of $40 million (the "Settlement Amount") for the benefit of the Settlement Class. This Settlement Amount was deposited on August 30, 2002 and has been earning interest since that time.

In recognition of the massive and ongoing expenditures required to prosecute the Actions, the Stipulation provides that $15 million of the Settlement Amount shall be set aside to pay for litigation expenses (the "Expense Fund"), subject to the Court's approval. The Representative Plaintiffs have agreed, subject to the approval of the Court, to allocate the Expense Fund 80.5% to the *Newby* and *WSIB* Actions on the one hand and 19.5% to the *Tittle* Action on the other.

The Representative Plaintiffs have also agreed that the remainder of the Settlement Amount will be allocated between the *Newby* Action and the *WSIB* Action, on the one hand, and the *Tittle* Action, on the other, by confidential, binding and non-appealable arbitration. As agreed, the arbitration will be conducted by Layn Phillips promptly after the Court has decided the pending motion to dismiss in the *Tittle* Action. After the arbitrator has ruled and upon further notice to the Settlement Class and an opportunity for Class members to be heard, the Representative Plaintiffs will present the arbitration decision to the Court for approval. No Representative Plaintiff, directly or indirectly, may challenge the arbitration decision.

In addition, to the extent permitted by the laws, regulations, and professional standards of their respective countries and subject to certain limitations set forth in the Stipulation, AWSC and

the Defendant Member Firms will make available to the Representative Plaintiffs the Enron related documents in their possession, custody, or control.

The Defendant Member Firms will also use their best efforts to identify and make available witnesses from such Defendant Member Firms, to the extent they are in the Member Firm's control, for interview by counsel to the Representative Plaintiffs at a mutually convenient time and place concerning Enron's financial statements and other Enron related matters.

If Representative Plaintiffs determine that they need similar information from an AWSC Entity other than the Defendant Member Firms, AWSC will undertake to use its best efforts to determine whether the AWSC Entity is in possession or control of such information and, if so, (i) to assist Representative Plaintiffs in obtaining such information on a voluntary basis, and (ii) to obtain waivers of the attorney-client (or any other) privilege and the work product (or any similar) doctrine by that AWSC Entity with respect to any document otherwise called for that was created during the class period encompassed in the Actions. Finally, the Defendant Member Firms will waive the attorney-client (or any other) privilege and the work product (or any similar) doctrine with respect to any document described above that was created during the class period asserted in the Actions.

IV. ARGUMENT

A. The Proposed Settlement is Within an Appropriate Range for Preliminary Approval

Public policy strongly favors the pretrial settlement of complex class action lawsuits. *See, e.g., Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995).

Rule 23(e) of the Federal Rules of Civil Procedure provides that before a class action may be dismissed or compromised, notice of the proposed dismissal or compromise must be given in the manner directed by the court, and judicial approval must be obtained. "Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997), citing *Manual for Complex Litigation (Third)*, *supra*, at §30.41. First, counsel submit the proposed terms of

settlement and the court makes a preliminary evaluation of the fairness of the settlement, prior to notice. *Id.* This initial assessment can be made on the basis of information already known to the court which, if necessary, may be supplemented by briefs, motions or an informal presentation from the settling parties. *Id.* Second, the court must finally approve the settlement after notice to the class and an opportunity to be heard has been given.

"Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *Id.*; *see also Manual for Complex Litigation (Third), supra,* at §30.41. Preliminary approval permits notice to be given to the class members of a hearing for final settlement approval (the second step of the approval process), at which class members and the settling parties may be heard with respect to final approval. *Manual for Complex Litigation (Third), supra,* at §23.14.

The proposed settlement now before this Court was achieved only after serious, informed, arm's-length negotiations and falls squarely within the range of reasonableness warranting notice apprising class members of the settlement and establishing a hearing for final approval.

B. Consideration of Final Approval Criteria Supports Preliminary Approval

The general standard for final approval of a proposed settlement of a class action, as repeatedly enunciated by the Fifth Circuit, is whether the proposed settlement is "fair, adequate and reasonable" and has been entered into without collusion between the parties. *Cotton*, 559 F.2d at 1330; *see also Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984) (*per curiam*). In applying this standard, the Court must determine whether, in light of the claims and defenses asserted by the parties, the proposed compromise represents a "reasonable evaluation of the risks of litigation." *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

It has long been settled that compromises of disputed claims are favored by the courts. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). The Fifth Circuit has consistently held that, as a result of their highly-favored status, settlements "'will be upheld whenever possible because they

are a means of amicably resolving doubts and preventing lawsuits.'" *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (citing *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)).

Settlements of class actions and shareholder litigation are "particularly favored" and are not to be lightly rejected. *Maher*, 714 F.2d at 455; *see also Cotton*, 559 F.2d at 1331. In the case of class actions, the Fifth Circuit has held that "there is an overriding public interest in favor of settlement," because such suits "have a well deserved reputation as being most complex." *Cotton*, 559 F.2d at 1331; *accord Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). Thus, in determining whether to approve the settlement, the trial judge is not required to decide the merits of the action or substitute a different view of the merits for that of the parties or counsel. *Maher*, 714 F.2d at 455.

In weighing the benefits obtained by settlement against benefits dependent on the likelihood of recovery on the merits, the courts are not expected to balance the scales perfectly. The "trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton*, 559 F.2d at 1330 (citations omitted). The very object of a compromise "'is to avoid the determination of sharply contested and dubious issues.'" *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971) (citations omitted).

Where, as here, experienced counsel have negotiated settlements at arm's length, a strong initial presumption is created that the compromise is fair and reasonable. *United States v. Texas Educ. Agency*, 679 F.2d 1104, 1108 (5th Cir. 1982). The Fifth Circuit has recognized that courts must rely to a large degree on the judgment of competent counsel, terming such counsel the "linchpin" of an adequate settlement. *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983). Thus, if experienced counsel determine that a settlement is in the class' best interests, "the attorney's views must be accorded great weight." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

When examined under the applicable criteria, this partial settlement is a very good result for the class. It is Representative Plaintiffs' counsel's judgment that there is a serious question as to

whether a more favorable monetary result against the settling defendants would be attained by a judgment after trial and the inevitable post-trial motions and appeals, or if, obtained, would be collectible given the economic circumstances present here, particularly with respect to AWSC. The settlement achieves a relatively prompt recovery, provides for the payment of certain litigation expenses being incurred on an ongoing basis, and is unquestionably superior to another possibility that unmistakably exists if the litigation continued with respect to the settling defendants: no recovery at all.

C. The Fifth Circuit's Six-Pronged Test of Fairness

Once satisfied that counsel adequately represented the class and has bargained for the proposed settlement in good faith, the "only question" for the Court to determine "'is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.'" *McNary v. American Sav. & Loan Ass'n*, 76 F.R.D. 644, 649 (N.D. Tex. 1977) (citations omitted). The Fifth Circuit has established a six-pronged test to be applied to proposed settlements:

1. The assurance that there is no fraud or collusion behind the settlement;
2. The stage of the proceedings and the amount of discovery completed;
3. The probability of plaintiff's success on the merits;
4. The range of possible recovery;
5. The complexity, expense and likely duration of the litigation; and
6. The opinions of class counsel, class representatives and absent class members.

Reed, 703 F.2d at 172; *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *see also Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986). This settlement easily passes muster when examined in light of these six criteria.

1. There Is No Fraud or Collusion Behind the Settlement

There is no collusion in the settlement of these Actions. The negotiations themselves were an outgrowth of the mediation proceedings ordered by the Court with respect to a possible global Andersen settlement. Representative Plaintiffs' counsel have many years of experience in litigating securities and ERISA class actions and have negotiated numerous other class settlements which have been approved by courts throughout the country. AWSC was represented by Sidley Austin Brown

& Wood, a firm with a national reputation for the tenacious defense of class actions and other complex civil matters. The settlement was negotiated at arms length by very senior members of these firms who are knowledgeable about the strengths and weaknesses of the claims made and the potential defenses to them. There can be no question that the class was fairly and adequately represented in the course of these proceedings.

2. The Stage of the Proceedings and the Amount of Discovery Completed

Representative Plaintiffs' counsel have reached a stage of knowledge where an intelligent evaluation of the role of AWSC and the Defendant Member Firms in these cases and the propriety of the settlement could be made. Counsel for the Representative Plaintiffs conducted and continue to conduct a thorough investigation of the salient facts regarding the Actions. Plaintiffs' counsel reviewed and analyzed voluminous publicly available documents relating to Enron's collapse. They also interviewed key witnesses and industry sources and consulted with experts. This document review and interview process made it clear that the way in which key issues in the Actions with respect to AWSC and the Defendant Member Firms would be resolved was by no means free from doubt. Suffice it to say, the parties reached agreements to settle with a "full understanding of the legal and factual issues surrounding this case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996). Nothing more is required. In fact, courts have held that a great amount of formal discovery is not a "necessary ticket to the bargaining table." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) (citing *Cotton*, 559 F.2d at 1332).

3. The Probability of Success on the Merits

If the motions to dismiss based on lack of jurisdiction and other grounds had been denied, plaintiffs still faced formidable obstacles to recovery at trial, both with respect to liability and damages. The principal claims in the *Newby* litigation are based upon §10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, and §11 of the 1933 Act. The principal claims in the *Tittle* case arise under ERISA, §1964 of RICO, and the Texas common law of negligence.

In order to prevail in the litigation, Representative Plaintiffs in the *Newby* litigation would have the burden of proving, *inter alia*, that AWSC and/or the Defendant Member Firms participated

either in the alleged Enron scheme or in the public dissemination of misleading information, that the information was material to investors in determining whether to invest in Enron securities, that the information impacted the market price of the stock and caused damage to the class and that, with respect to the §10(b) claims, that AWSC and/or the Defendant Member Firms acted with scienter. *See generally Cyrak v. Lemon*, 919 F.2d 320, 325 (5th Cir. 1990).

For the *Tittle* plaintiffs to prevail on their claims, they would be required to prove that the Settling Defendants: were fiduciaries under ERISA and breached their duties to plaintiffs; constituted a RICO enterprise and engaged in a pattern of racketeering activity constituting multiple acts of various criminal offenses; and owed a duty of care to plaintiffs under Texas common law and breached that duty. There was a substantial risk that a jury would have found the Settling Defendants did not participate in any of the audit work at issue and were too far removed from the locus of activity and knowledge at Enron to be liable under any of the *Tittle* plaintiffs' claims.

Given AWSC's and the Defendant Member Firms' arguments that they did not participate in the alleged scheme and that no allegations were made claiming that the services they provided were deficient in any way, establishing liability was simply not a given.

4. The Range of Possible Recovery and the Difficulties in Proving Damages

a. Risks in Proving Damages

Even if Representative Plaintiffs were successful in establishing liability on the part of AWSC and/or the Defendant Member Firms at trial, they would face substantial risks in proving the amount of damages caused by these defendants.

With respect to the Newby and WSIB Actions, given the presence of many, arguably more culpable, defendants and the proportionate liability provisions of the Private Securities Litigation Reform Act of 1995, there was a substantial risk that a jury would find that AWSC and/or the Defendant Member Firms were liable, if at all, for minuscule damages. With respect to the Tittle ERISA case, there were similar concerns about the degree of fault that would be assigned to the Settling Defendants on certain claims, particularly the negligence claim under Texas common law.

In sum, Representative Plaintiffs recognize that, had these cases proceeded to trial, it may have been very difficult to recover all or even most of the damages claimed as against AWSC or the Defendant Member Firms. Therefore, Representative Plaintiffs' counsel believe that the settlement represents a very good result for the class.

b. The Settlement Falls Within the Range of Reasonableness

Courts agree that determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 630 (E.D. Pa. 1986).

> In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

Detroit v. Grinnell Corp., 495 F.2d 448, 455 n.2 (2d Cir. 1974); *Parker*, 667 F.2d at 1210 n.6; *McNary*, 76 F.R.D. at 650. Similarly, as the court stated in *Karasik v. Pacific Eastern Corp.*, 180 A. 604, 609 (Del. Ch. 1935):

> [T]he amount claimed is one hundred million dollars and the amount received in settlement is a minimum of three hundred and eighty-five thousand dollars. Now that is a wide disparity. But it is one thing to assert a claim and another thing to prove the claim to judgment. Furthermore, it is one thing to obtain a judgment, and quite another thing to collect it. Figures, however imposing, should not compel practical considerations to yield place to visions.

Here, the total damages claimed are in the billions of dollars. However, given the issues with respect to jurisdiction, liability, damages and the collectibility of any judgment, the Settlement Amount is quite reasonable and the cooperation provisions provide additional value for the benefit of the Settlement Class.

5. The Complexity, Expense and Likely Duration of This Litigation

Another reason for counsel to recommend, and the courts to approve, a settlement is the complexity, duration and risks of further litigation. *Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1968) (court must consider, *inter alia*, "the

complexity, expense, and likely duration of such litigation"); *Manchaca*, 927 F. Supp. at 966.[4] Here, several factors are present which make it more likely that, without the settlement, these cases would require additional large expenditures and years of litigation as against the settling defendants and there would be a significant risk that the class would obtain results far less beneficial than the ones provided by the settlement.

(a) AWSC and the Defendant Member Firms are represented by extremely capable counsel who are familiar with the defense of complex securities class actions such as these Actions. Since the inception of the litigation, AWSC and the Defendant Member Firms have denied liability and asserted facially reasonable explanations in response to plaintiffs' allegations.

(b) Trials of these Actions against AWSC and the Defendant Member Firms would unquestionably entail months and involve the introduction of hundreds of exhibits dealing with dry financial and accounting matters, vigorously contested motions and the expenditure of millions of dollars in additional out-of-pocket expenses.

(c) Trials would necessarily involve complex issues resulting in conflicting expert testimony, the outcome of which is by no means certain. Thus, if there were further litigation, with respect to these defendants, and trial, there is a risk that the plaintiffs might fail to convince the trier of fact of the merits of their cases and that AWSC or the Defendant Member Firms could obtain judgment in their favor.

(d) Even if the class could eventually recover a larger judgment after trial, the collectibility of such a judgment against AWSC and the Defendant Member Firms was in serious doubt. Moreover, any future trial judgment would still be subject to the continuing risks and vicissitudes of litigation, through possible appeals. Experience shows that even very large judgments, recovered after lengthy litigation and trial, can be completely lost on appeal.[5]

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[4] Courts have frequently recognized, in evaluating a proposed settlement of a securities class action, that such litigation "is notably difficult and notoriously uncertain." *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973) (citing *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971)). Accordingly, compromises of securities class actions are particularly appropriate.

[5] As the court noted in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971):

Thus, counsel believe that were these Actions tried through to conclusion rather than settled, there was a real risk of not obtaining a larger recovery against AWSC or the Defendant Member Firms, particularly since any securities case such as this, "by its very nature, is a complex animal." *Clark v. Lomas & Nettleton Financial Corp.*, 79 F.R.D. 641, 654 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980).

6. The Opinion of Representative Plaintiffs' Counsel

As noted above, experienced Representative Plaintiffs' counsel, after substantial arm's-length negotiations with senior defense counsel, have concluded that the settlement is fair, reasonable and adequate. Here, Representative Plaintiffs' counsel have acquired an early but thorough understanding of the Actions and submit that the settlement is appropriate and should be approved. The view of plaintiffs' counsel, while not conclusive, is "entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 528 (E.D. Tex. 1995).

For all of the foregoing reasons, the settlement deserves the court's preliminary, and ultimately final, approval.

D. Certification of the Settlement Classes Under Federal Rule of Civil Procedure 23 is Appropriate

In order to go forward with the settlement approval process, it is necessary that the Court certify a class in the Actions for purposes of the settlement. Federal Rule of Civil Procedure 23 provides that an action may be maintained as a class action if each of the four prerequisites of Rule

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> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973) (reversing treble damage judgment for over $145,000,000 – in action begun in 1961); *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977) (reversing Second Circuit's award of damages under Williams Act in amount of $25,793,365 – after eight years litigation); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (reversing jury verdict on appeal); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict).

23(a) is met and, in addition, the action qualifies under one of the subdivisions of Rule 23(b). Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides, in relevant part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and, in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

As set forth below, all of the requirements of Rule 23 are easily met and certification of the class is clearly appropriate here.

1. The Class is Sufficiently Numerous

To meet the requirement of numerosity, the class representatives need only show that it is difficult or inconvenient to join all the members of the class. *See Zeidman v. J. Ray McDermott Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 55 (S.D.N.Y. 1993). During the class period, there were millions of shares of Enron Securities outstanding and traded. Similarly, there are well over 20,000 participants and beneficiaries in the

proposed *Tittle* settlement class. The threshold for a presumption of impracticality of joinder is thus easily exceeded.

2. Common Questions of Law or Fact Exist

In order to maintain a class action, there must be "questions of law ***or*** fact common to the class ...." Fed. R. Civ. P. 23(a)(2) (emphasis added). Generally, courts have liberally construed the commonality prerequisite, holding that the "[t]hreshold of 'commonality' is not high." *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). "The commonality requirement is satisfied even where there is not a complete identity of facts, so long as the party opposing the class has engaged in some 'course of conduct' that affects the proposed class and gives rise to causes of action requiring similar elements." *Zupnick v. Thompson Parking Partners*, No. 89-Civ.6607(JSM), 1990 U.S. Dist. LEXIS 9881, at *9 (S.D.N.Y. Aug. 1, 1990) (citations omitted).

These Actions present numerous common questions of both law ***and*** fact, including, *inter alia*:

(i) Whether AWSC's and/or the Defendant Member Firms' acts as alleged herein violated the federal securities laws;

(ii) Whether defendants were fiduciaries within the meaning of ERISA;

(iii) Whether ERISA was violated by defendants' acts and omissions;

(iv) Whether the defendants' conduct violated RICO;

(v) Whether defendants engaged in a pattern of racketeering;

(vi) The existence of the conspiracy, its membership, its duration, and its characteristics;

(vii) Whether the Defendant Member Firms were negligent in the performance of audits for Enron and the Savings Plan;

(viii) Whether AWSC and/or the Defendant Member Firms participated in and pursued the common course of conduct complained of;

(ix) Whether documents, SEC filings, press releases and other statements disseminated to the investing public and Enron Securities purchasers during the class period misrepresented material facts about the operations, financial condition and earnings of Enron;

(x) Whether the market prices of Enron Securities during the class period were artificially inflated due to material misrepresentations and the failure to correct the material misrepresentations complained of; and

(xi) To what extent the members of the class have sustained damages and the proper measure of damages.

3. Representative Plaintiffs' Claims are Typical of Those of the Classes

The typicality requirement is satisfied where, as here, "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). Typicality does not require that the interests of the named representatives and the class members be identical. *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981).

The Representative Plaintiffs' claims, which arise from the same course of conduct and are predicated on the same legal theories as the claims of all other members of the classes they represent, easily satisfy the typicality requirement of Rule 23(a). *See Durrett v. John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993); *see also Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (test for typicality, like commonality, is not demanding).

4. Representative Plaintiffs Are More Than Adequate Representatives of the Class

The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. v. Windsor*, 521 U.S. 591, 594 (1997). The factors relevant to a determination of adequacy are: (1) the absence of potential conflict between the named plaintiff and the class members, and (2) that counsel chosen by the representative parties is qualified, experienced and able to vigorously conduct the proposed litigation. *Drexel*, 960 F.2d at 291; *Longden v. Sunderman*, 123 F.R.D. 547, 557 (N.D. Tex. 1988).

Here, there are no conflicts between the Representative Plaintiffs and absent members of the *Newby* and *Tittle* classes. The Representative Plaintiffs are adequate as demonstrated by the fact that they have retained experienced counsel to bring this litigation against defendants. Thus, the

representatives for the classes have clearly shown that they are more than adequate representatives for the classes. Representative Plaintiffs' counsel include some of the preeminent class action attorneys in the country, who have qualified as lead counsel in this and other securities and ERISA class actions. Representative Plaintiffs' counsel have a proven track record in the prosecution of class actions; they have successfully litigated and tried many major class action cases.

5. The Requirements of Rule 23(b)(1) Are Also Satisfied With Respect to the ERISA Claims in the *Tittle* Litigation

Rule 23(b)(1) clearly authorizes certification of the *Tittle* plaintiffs' ERISA claims. As indicated in the Advisory Committee Notes, Rule 23(b)(1)(B) particularly applies to situations such as "an action which charges a breach of trust by [a] fiduciary affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust."

The consideration underscoring the appropriateness of certifying a Rule 23(b)(1)(B) class to facilitate this settlement is that the underlying ERISA claim is by law representative in nature because it is being "brought in a representative capacity on behalf of the plan as a whole." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). As a result, any relief a court grants to remedy a breach of fiduciary duty under ERISA does not inure to the individual plaintiffs but rather "to the benefit of the plan as a whole." *Id.* at 140.[6] In short, any action for breach of fiduciary duty under ERISA could as a practical matter impair the standing of any other participant to bring suit by disposing of all the benefits for all of the participants. Because of that, courts commonly certify ERISA claims such as those in the *Tittle* Action under Rule 23(b)(1)(B).[7]

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[6] *See* ERISA §409(a) (29 U.S.C. §1109(a)) (liability for breach of fiduciary duty is "to the plan"); ERISA §502(a)(2) (29 U.S.C. §1132(a)(2)) (authorizing plan participants to sue for breach of fiduciary duty under §409(a)).

[7] *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001) (certifying 23(b)(1)(B) ERISA class because: "Any decision regarding whether the defendants breached their fiduciary duties would necessarily affect the interests of other participants."); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000) (same result: "[G]iven the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief."); *Specialty Cabinets & Fixtures v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991) (same result: "Because an individual ERISA action to remedy breaches of fiduciary duty would 'substantially impair or impede' the ability of absent beneficiaries to protect their interests, courts should certify these actions pursuant to Rule

6. The Requirements of Rule 23(b)(3) Are Also Satisfied With Respect to All of the Non-ERISA Claims

Rule 23(b)(3) authorizes certification where, in addition to the prerequisites of Rule 23(a), common questions of law ***or*** fact predominate over any individual questions and a class action is superior to other available means of adjudication. *Amchem*, 521 U.S. at 591-594. This litigation easily meets Rule 23(b)(3)'s requirements with respect to all of the non-ERISA claims.

a. Common Legal and Factual Questions Predominate in This Action

"Predominance is a test readily met in certain cases alleging consumer or ***securities fraud*** or violations of the antitrust laws." *Amchem*, 521 U.S. at 625 (emphasis added). In these cases, defendants' alleged liability arises from their scheme to defraud and their dissemination of false and misleading statements and the omission of material facts regarding Enron's business operations and financial condition. This is the central issue in these cases and it predominates over any individual issues that theoretically might exist.[8]

Predominance is equally satisfied in the context of the non-ERISA claims in *Tittle* because the overwhelming focus of plaintiffs' civil RICO and common law claims is on defendants' concerted course of conduct. Just as for the civil RICO claims certified by this Court in *Henry v. Cash Today, Inc.*, 199 F.R.D. 566 (S.D. Tex. 2000):

> [T]he common questions are whether Defendants were engaged in racketeering activity or collecting an unlawful debt, whether an enterprise exists, and whether defendants conducted or participated in an enterprise.

Id. at 572.[9]

23(b)(1)(B).") (citations omitted).

[8] It is well established that differences between individual class members as to reliance or damages do not preclude certification of a class. *See, e.g., Teichler v. DSC Communications Corp.*, No. CA3-85-2005-T, 1988 U.S. Dist. LEXIS 16448, at *2 (N.D. Tex. Apr. 26, 1988). Moreover, under the fraud-on-the-market presumption, reliance is presumed once materiality is shown. *Basic Inc. v. Levinson*, 485 U.S. 224, 243-47 (1988); *Fine v. American Solar King Corp.*, 919 F.2d 290, 299 (5th Cir. 1990). Proof of the amount of damages can also be established on a class-wide basis by using a generalized formula. *Shelter Realty Corp. v. Allied Maintenance Corp.*, 75 F.R.D. 34, 38 (S.D.N.Y. 1977).

[9] A more complete analysis of the appropriateness of certifying the *Tittle* plaintiffs' claims under Rule 23(b)(1), 23(b)(2), and Rule 23(b)(3) is found in their Memorandum of Law in Support of Motion for Class Certification at pages 45-67 and in their Reply Memorandum of Law in Support

b. A Class Action is the Superior Means to Adjudicate Plaintiffs' Claims

The second prong of Rule 23(b)(3) is essentially satisfied by the settlement itself. As explained in *Amchem*, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." 521 U.S. at 619. Thus, any manageability problems that may have existed here are eliminated by the settlement.

E. Submission of the Settlement to the Classes is Appropriate

Pursuant to the Stipulation of Settlement, Representative Plaintiffs and AWSC and the Defendant Member Firms recommend to the Court a program and form of notice substantially in the form of Exhibit A to the Stipulation of Settlement. The Stipulation provides that a copy of the Notice of Pendency and Proposed Partial Settlement of Class Action (the "Notice"), will be mailed to each class member who can be identified with reasonable effort and each nominee who were securities holders of record for class members who purchased the relevant securities during the class period. The proposed settlement also provides that a summary notice is to be published twice in the national edition of *Investors Business Daily* and *The Houston Chronicle* shortly after mailing the Notices. The Notice details the settlement terms, the rights of class members to share in the recovery, or request exclusion. They also provide notice of the date, time, and place of the fairness hearing and the right of class members to be heard at the hearings. Finally, they provide the name, address and phone number of plaintiffs' counsel's representatives for inquiries. The form and manner of notice proposed here fulfill all of the requirements of Federal Rule of Civil Procedure 23 and due process.

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of Motion for Class Certification at pages 29-56.

V. CONCLUSION

For all the foregoing reasons, Representative Plaintiffs respectfully request that the Court grant the motion for preliminary approval of the proposed settlement.

DATED: July 8, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by sending a copy via electronic mail to serve@ESL3624.com on this 9th day of July, 2003.

I further certify that a copy of the foregoing has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 9th day of July, 2003.

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United States Trustee, Region 2
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New York, NY 10004

Deborah S Granger

Deborah S. Granger